Supreme Court, U.S.
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No. 98-1524

In The

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF CONNECTICUT, ET AL.,

Petitioners,

v.

CLIFFORD DAVIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

TABLE OF CONTENTS

Page

Questions Presented i

Statement 1

Argument 4

I. There Is No Compelling Conflict Among The Circuits 6

II. The Court of Appeals For The Second Circuit Correctly Concluded That Congress Clearly And Properly Abrogated The States' Sovereign Immunity When It Extended The ADEA To The States 8

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 10

City of Boerne v. Flores, 521 U.S. 507 (1997) ...1, 2, 4, 9, 10

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 10

Coger v. Board of Regents, 154 F.3d 296 (6th Cir. 1998) 6

Davidson v. Board of Governors, 920 F.2d 441 (7th Cir. 1990) 9

Ex parte Virginia, 100 U.S. 339 (1879) 9

Fitzpatrick v, Bitzer, 427 U.S. 445 (1976) 9

Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998) 6, 9

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

Humenansky v. Regents of the University of Minnesota, 152 F.3d 822 (8th Cir. 1998) 6, 7

Hurd v. Pittsburg State Univ., 109 F.3d 1540 (10th Cir. 1997) 8, 9

Keeton v. University of Nevada Sys., 150 F.3d 1055 (9th Cir. 1998) 6

Kimel v. Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998) 6, 7

Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998) 6

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 3

TABLE OF AUTHORITIES – Continued

Page

Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998) 6

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 1, 2, 8

United States v. Price, 383 U.S. 787 (1966) 9

Vance v. Bradley, 440 U.S. 93 (1979) 10

STATUTES

2 U.S.C. 1311(a)(2)(b)(2) (Supp. III 1997) 2

5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997) 2

5 U.S.C. 3307, 8335 3

28 U.S.C. 2403(a) 3

29 U.S.C. 201 et seq. 3

29 U.S.C. 216(b) 3

29 U.S.C. 621 et seq. 1

29 U.S.C. 623(a)(1) 2

29 U.S.C. 623(j) (Supp. III 1997) 3

29 U.S.C. 626(b) 3

29 U.S.C. 626(c)(1) 3

29 U.S.C. 630(b) 2

29 U.S.C. 630(f) 2

29 U.S.C. 633a(a) (1994 & Supp. III 1997) 2

29 U.S.C. 633a 2

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A1-A19) is reported at 162 F.3d 770. The opinion of the district court (Pet.App. A20-A28) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 1998. The petition for a writ of certiorari was filed on March 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Board of Trustees of the University of Connecticut, and the University of Connecticut (collectively "the University") ask this Court to review the decision of the Second Circuit Court of Appeals holding that Congress clearly and constitutionally abrogated the States' Eleventh Amendment immunity when it amended the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. ("ADEA") to apply to the states. For nearly four years, the University did not question that state employees who were victims of age discrimination could invoke the protection of the federal courts. The University now contends that this understanding was called into question by two rulings of this Court: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). Those cases, however, do not substantially alter the analysis supporting the

conclusion that, in amending the ADEA to apply to the States, Congress properly and clearly abrogated the States' immunity from suit by individuals. Six circuit courts of appeals agree. Despite the University's current position, it is well established among the great majority of circuit courts of appeals, even after *Seminole Tribe* and *Boerne*, that the ADEA properly abrogates sovereign state immunity. Moreover, the validity of abrogation under the ADEA is firmly supported by the principles of law announced by this Court, and review is unnecessary. Accordingly, the University's Petition should be denied.

The ADEA renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).[1] The ADEA authorizes

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[1] The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. III 1997). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (1994 & Supp. III 1997); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum

individuals aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 et seq. See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * * , and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

Respondents were faculty members employed by the University. Pet.App. A5. Respondents filed suit in federal district court in 1992 alleging, *inter alia*, that the University discriminated on the basis of age in granting salary increases, in violation of the ADEA. *Ibid.* The University moved to dismiss on the ground of Eleventh Amendment immunity. *Id.* at A6, A21. The district court denied the motion to dismiss. *Id.* at A23-A27.

The University took an interlocutory appeal as of right of the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court

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hiring ages and mandatory retirement ages, in both federal and state government employment. See, e.g., 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. III 1997) (state).

of appeals consolidated the appeal with two others raising the same issue and affirmed. Pet.App. A1-A9.

The court first "join[ed] the majority of the other circuits that have considered the question" (Pet.App. A12) in holding that Congress clearly expressed its intent to abrogate Eleventh Amendment immunity in "[t]he ADEA as a whole" (*id.* at A15). The court explained that "the combination of the amendments to 'employer' and 'employee' " in 1974, which explicitly expanded the ADEA's coverage to include the States and their employees (*id.* at A14); "the availability of private damage actions [that] makes it clear that States are intended to be subject to liability" (*ibid.*); and the ADEA's incorporation of the FLSA enforcement provision that specifically authorizes suits against "a public agency" (*id.* at A17), made "unmistakably clear" (*id.* at A16) Congress's intent to abrogate Eleventh Amendment immunity.

The court of appeals also "agree[d] with the overwhelming weight of authority holding that the ADEA was adopted pursuant to Section 5 of the Fourteenth Amendment" (Pet.App. A18) and that the statute "is sufficiently limited in scope to pass the *City of Boerne* [*v. Flores*, 521 U.S. 507 (1997)] test," which requires that Section 5 legislation reflect a congruence and proportionality between the injury prevented and the means adopted (*id.* at A19).

ARGUMENT

When it argued its motion to dismiss in the district court, the University did not dispute that Congress

clearly intended to abrogate the States' immunity from suit when it amended the ADEA. Pet.App. A23 ("the parties do not dispute" that "Congress intended that ADEA abrogate Eleventh Amendment sovereign immunity"). Thus, one issue the University now claims is so compelling that it warrants Supreme Court review is an issue it did not even bother to raise when it first challenged the court's jurisdiction.

The other issue the University seeks to raise, whether Congress properly exercised its authority under the Fourteenth Amendment when it applied the ADEA to the States, is also an issue the University raised for the first time on appeal. Its position in the district court was that the ADEA was passed exclusively pursuant to the Commerce Clause; the University never questioned whether the ADEA was a valid exercise of Fourteenth Amendment power because it never acknowledged that the statute was actually enacted under the Fourteenth Amendment. Nevertheless, the University now challenges the Second Circuit's agreement with the vast majority of the other circuits that hold the ADEA is a valid exercise of Congress' Fourteenth Amendment power.

The University's Petition for a Writ of Certiorari should be denied. First, there is no compelling conflict between the decision of the Second Circuit Court of Appeals and a decision of another circuit court of appeals. Second, the decision of the Second Circuit stands on well established principles which should not be disturbed.

I. There Is No Compelling Conflict Among The Circuits

A petition for a writ of certiorari will be granted "only for compelling reasons." S.Ct. R. 10. The University has not shown a compelling reason for the Court to exercise its certiorari jurisdiction.

As the University concedes, the decision of the Second Circuit is entirely consistent with the decisions of five other circuit courts of appeals. *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998); *Scott v. University of Mississippi*, 148 F.3d 493 (5th Cir. 1998); *Keeton v. University of Nevada Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998); see Pet. 5. Like the Second Circuit decision below, each of these five decisions reflects the unanimous and well reasoned decision of the panel.

By contrast, the two cases the University claims create a conflict are sharply divided decisions that reflect neither a uniform nor reliable analysis. *Humenansky v. Regents of the University of Minnesota*, 152 F.3d 822 (8th Cir. 1998), was a two to one decision in which the majority concluded that the ADEA did not reflect an adequately clear congressional intent to abrogate. In dictum, the majority opined that even if intent to abrogate were clear, such abrogation would be unconstitutional. The dissent would have joined the other circuit courts of appeals that found a valid abrogation of Eleventh Amendment immunity. Similarly, *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), produced three

different opinions. One panel member, Judge Edmondson, found inadequate congressional intent to abrogate; another panel member, Judge Cox, found clear intent to abrogate, but concluded Congress lacked Congressional authority to do so; the third panel member, Judge Hatchett, would hold that the ADEA reflects a valid abrogation of state sovereign immunity.

To the degree *Kimel* and *Humenansky* raise issues that require clarification, this Court will have that opportunity because *Kimel* is currently pending before the Court. *Kimel v. Florida Board of Regents*, cert. granted, 119 S.Ct. 901 (1999) (No. 98-796). Moreover, those cased do not present a sufficiently compelling conflict to justify certiorari jurisdiction in this case. On the issue of whether Congress constitutionally extended the ADEA to apply to the States, no majority decision that is binding in any circuit conflicts with the decision of the Second Circuit Court of Appeals. Only one judge in *Kimel* supports the University's position, and the two judges in *Humenansky* who would agree stated their position in dictum. On the issue of whether Congress clearly abrogated state immunity, the issue the University conceded in the district court, only the divided *Humenansky* decision supports the University. In light of the clear and consistent holdings of six circuit courts of appeal, the University has not demonstrated such a compelling conflict on an important matter to justify review on a writ of certiorari.

II. THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT CONGRESS CLEARLY AND PROPERLY ABROGATED THE STATES' SOVEREIGN IMMUNITY WHEN IT EXTENDED THE ADEA TO THE STATES

The University argues that Congress failed to express adequately its intent to abrogate the States' sovereign immunity when it extended the ADEA to apply to the states. Despite numerous references to the "State" in the text of the ADEA, despite a definition of an employer as including a "state", and despite an enforcement provision that expressly authorizes suit in "any Federal" court, the University maintains that the ADEA is at best an ambiguous expression of Congressional intent to subject the States to suit in federal court for violations of the statute. However, in *Seminole Tribe*, the case that the University argued cast doubt on the validity of the district court's jurisdiction in this action, this Court held "we agree with the parties, with the Eleventh Circuit in the decision below, . . . and with virtually every other court that has confronted the question" that textual references to the state as an appropriate defendant "make it indubitable that Congress intended . . . to abrogate the states' sovereign immunity from suit." *Seminole Tribe*, 116 S.Ct. at 1124.[2] There is simply "no reason to question . . . that Congress intended to abrogate state sovereign immunity by enacting the 1974 Amendments to the ADEA." *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir. 1997),

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[2] For a detailed discussion of the specific provisions of the ADEA that make reference to the "State," and authorize suits in federal court, *see* Pet.App. A14-A17.

and n.4 ("Since the 1974 Amendments to the ADEA . . . the Supreme Court and other [appeallate] courts have uniformly held that congress expressly intended to abrogate state sovereign immunity and subject states to suit under the ADEA" (citations omitted)). As the Seventh Circuit Court of Appeals has stated, " 'unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases – and that degree of explicitness is not required . . . – it could not have made its desire to override the states' sovereign immunity clearer.' " *Goshtasby v. Board of Trustees*, 141 F.3d 761, 766 (7th Cir. 1998) (quoting *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990)).

The University also argues that abrogation through the ADEA would be an unconstitutional exercise of Congress' authority to enforce Section 5 of the Fourteenth Amendment. In support of its argument, the University relies on *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). *City of Boerne*, however, reaffirmed that "Section 5 is a positive grant of legislative power to Congress." 117 S.Ct. at 2163. Under its Section 5 power, Congress may provide remedies for violations of the substantive provisions of the Fourteenth Amendment, including the Equal Protection Clause. *See United States v. Price*, 383 U.S. 787, 789 (1966), *Ex parte Virginia*, 100 U.S. 339, 345 (1879). This power includes the ability to abrogate the States' Eleventh Amendments immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for

private suits against States or State officials which are constitutionally impermissible in other contexts.").

The ADEA is clearly an appropriate preventative and remedial exercise of Congress' Section 5 power under the standards of *City of Boerne*. The statute does not, as the University argues, create a right that the Constitution does not already protect. While age discrimination is not subject to strict scrutiny review, it is subject to rational basis review. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979). It is, moreover, clear that "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most differential standard of review." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83 (1988); *see e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). Through the ADEA, Congress was simply providing a remedial and preventative legislative scheme to address wrongful age discrimination – Congress was not creating or changing a substantive right.

CONCLUSION

For all of the reasons stated herein, Respondents request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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